STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 18, 2000
v	No. 215282 Muskegon Circuit Court
BRIAN KEITH JONES, Defendant-Appellant.	LC No. 98-041552-FH

Before: Fitzgerald, P.J., and Saad and Whitbeck, JJ.

PER CURIAM.

A jury convicted defendant Brian Keith Jones of delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). The trial court sentenced Jones as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, to a prison term of three to ten years. Jones now appeals as of right. We affirm.

I. Basic Facts And Procedural History

Jones seeks review of the trial court's order denying his motion to dismiss. Jones's motion alleged that, on December 29, 1997, the district court erred when it adjourned his preliminary examination because a key witness, an undercover officer who allegedly purchased cocaine from Jones and then arrested him, was not present at the hearing. The officer later testified that he did not attend the proceeding, even though he had been properly subpoenaed by the prosecutor, because he was on vacation and had forgotten about the proceeding. Jones argued that the district court did not have good cause for adjournment based on the witness forgetting about the proceeding and that the district court did not provide sufficient reasons on the record for adjournment. The trial court concluded that unavailability of a witness was good cause for adjournment and that the district court did not need to articulate good cause because it was evident from the proceedings. Jones argues that this finding by the trial court was in error. Jones also argues that he was denied effective assistance of counsel.

II. Good Cause For Adjournment

A. Preservation Of The Issue

People v Crawford, 429 Mich 151, 161-162; 414 NW2d 360 (1987), outlines the steps a defendant must take in order to preserve a claim that a preliminary examination was not timely held or that the record failed to make a showing for delay. See also MCR 6.110(B)(2). First, a defendant must raise this issue "in a written or oral motion no later than immediately before the commencement of the preliminary examination." MCR 6.110(B)(2); *Crawford*, *supra* at 161. Jones met this requirement by requesting dismissal on the basis of this issue.

Second, if a defendant wishes to challenge a denial of his motion, he must "before the trial either file a timely application for leave to appeal with the trial court or, within 21 days after the filing of the information in the trial court, file a motion to dismiss in the trial court." MCR 6.110(B)(2); *Crawford, supra* at 162. Jones did not apply for leave to appeal with the trial court. Instead, Jones filed two motions to dismiss. However, these motions were filed more than twenty-one days after the filing of his felony information and were, therefore, untimely. Despite the untimeliness of these motions, the trial court heard arguments on their merits, and ultimately denied them.

Finally, "[i]f relief is denied by the trial court, a defendant who wishes to obtain further review shall file a timely application with the Court of Appeals." MCR 6.110(B)(2); *Crawford*, *supra* at 162. In this case Jones did not seek timely review with this Court. As a result, this issue is not preserved for appeal.

B. Standard Of Review

We review unpreserved, nonconstitutional issues for plain error that affect a defendant's substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). In other words, "1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error . . . [caused] prejudice . . . ." *Id*. at 763, citing *United States v Olano*, 507 US 725, 731-734; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

C. *People v Horne*

Pursuant to MCL 766.4; MSA 28922, a defendant is entitled to a preliminary examination within fourteen days of arraignment. Jones's preliminary examination was scheduled within the time limit imposed by this statute, but then adjourned for slightly less than a month. A magistrate has the authority to adjourn a preliminary examination "for good cause shown." MCL 766.7; 28.925. Jones contends that there is no good cause to adjourn the hearing when the prosecution's key witness fails to appear because he forgot about the court date.

In *People v Horne*, 147 Mich App 375, 377; 383 NW2d 208 (1985), this Court determined that good cause is shown when essential witnesses are unavailable or on vacation. This precedent applies here because the undercover officer was similarly unavailable for the December 29, 1997 arraignment. Thus, the district court had good cause for adjournment under *Horne*.

However, even if this reason did not constitute good cause for adjournment, Jones failed to show, or even allege, any prejudice he suffered as a result of the untimely proceeding. See *Carines*, *supra* at 763; *People v Haines*, 105 Mich App 213, 215; 306 NW2d 455 (1981) ("[T]o merit reversal for violation of MCL 766.7; MSA 28.925, a defendant must show prejudice.") He merely claims that his right to a prompt examination was violated and that, as a result, this Court should reverse his convictions. No prejudice is apparent from the record. Indeed, we note that, at a later hearing held before the district court on January 8, 1998, Jones himself requested and received *another* adjournment. Further, the district court apparently released Jones on his own recognizance at the December 29, 1997 preliminary examination; Jones was not deprived of his liberty during the period of the adjournment. Therefore, we will not reverse.

III. Ineffective Assistance Of Counsel

A. Preservation Of The Issue

Jones argues that he was denied effective assistance of counsel because counsel failed to pursue the appropriate remedy after the trial court denied relief. Defendant correctly notes that MCR 6.110(B)(2) and *Crawford*, *supra*, required his trial counsel to file a timely application with this Court once the trial court denied his motion to dismiss. Jones argues that he received ineffective assistance because his trial counsel should have been aware of this requirement but did not follow it. He did not, however, move for a new trial or for an evidentiary hearing, *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), on this issue. Therefore, he has not preserved this claim for appeal.

B. Standard Of Review

When reviewing an unpreserved claim of ineffective assistance of counsel, this Court's review is limited to the facts contained on the record. *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987).

C. Legal Standard

"Effective assistance of counsel is presumed, and a defendant bears a heavy burden of proving otherwise." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). This Court will reverse a conviction for ineffective assistance of counsel if a defendant shows that (1) his counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) that the result of the proceeding was fundamentally unfair or unreliable. *Id.*; *People v Poole*, 218 Mich App 702, 717-718; 555 NW2d 485 (1996), citing *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994).

D. Unfairness Or Unreliability

In view of the record, we conclude that Jones's counsel at trial was not ineffective for failing to appeal the trial court's denial of his motion to dismiss in a timely manner. Jones has not shown that the result of his proceeding was fundamentally unfair or unreliable or how this failure to appeal the trial

court's ruling on this motion affected the result of his proceeding. In short, we do not see how defense counsel's failure to seek appeal of his motion to dismiss resulted in any prejudice to him. Defense counsel was effective.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Henry William Saad
/s/ William C. Whitbeck